ST. CHARLES MINING CO., INC.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 84-862 Decided October 30, 1986

Appeal from a decision of Administrative Law Judge David Torbett requiring the performance of additional reclamation work on surface mining site. NX 0-174-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Specificity

A violation is described with reasonable specificity and satisfies the requirements of sec. 521(a)(5) of the Act where a surface mining site has been subdivided into separate sections, and specific findings as to highwalls and remedial work required are made with respect to such sections. An allegation on appeal that such findings are either indefinite or provide inadequate notice will not be sustained where, during the course of the proceeding, two hearings were held, the operator was given ample opportunity to present all aspects of his case, and, after the decisions were rendered, failed to utilize the opportunity to seek clarification of what reclamation work was required.

2. Surface Mining Control and Reclamation Act of 1977: Approximate Original Contour: Generally--Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Highwall Elimination

The complete elimination of highwalls is an absolute requirement of the Surface Mining Control and Reclamation Act of 1977 and its implementing regulations, and neither that Act nor those regulations provide authority for an evaluation of comparative environmental harm from eliminating highwall exposures or allowing such exposures to remain.

APPEARANCES: John L. Kilcullen, Esq., Washington, D.C., for appellant; Charles P. Gault, Esq., Office of the Field Solicitor, U.S. Department of the

Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement; Norman L. Dean, Jr., Esq., and L. Thomas Galloway, Esq., Washington, D.C., for amicus curiae, Hazel King, et al.

OPINION BY ADMINISTRATIVE JUDGE KELLY

St. Charles Mining Company, Inc. (appellant), has appealed from a decision dated August 6, 1981, by Administrative Law Judge David Torbett requiring it to perform additional reclamation work on surface mining permit 2489-73/7104-77 located in the Child's Branch area of Harlan County, Kentucky. The mining activity involved recovery of the No. 12 coal seam for a distance of approximately 8,000 linear feet along the side of a steep slope.

This case arose on September 18, 1979, when Office of Surface Mining Reclamation and Enforcement (OSM) Inspector Tony Gaw issued to appellant Notice of Violation (NOV) 79-2-69-16(2). As modified, the NOV described the following violation:

Nature of the Violation

Operator has failed to backfill and grade to the approximate original contour, and the highwall shall be completely covered with spoil.

Provision(s) of the Regulations, Act, or Permit Violated

716.2(a)(2)

Portion of the Operation to which Notice Applies

The disturbed area on north side of Childs Branch extending around the mountain to the North side of Browning Branch. This includes from silt pond #3 to #23. However, this excludes the central portion of the area that was disturbed prior to May 3, 1978.

Remedial Action Required (including interim steps, if any)

Transport spoil from the lower disturbed coal level and/or any other legal area to properly complete approximate original contour backfilling and grading of the entire disturbed area and completely eliminate the highwall.

Proper placement and compaction of the spoil must be achieved to assure stability of the area. This is due to the steep slopes and spoil slippage (instability) that has occurred presently between the upper and lower coal levels.

All graded areas should be properly seeded with a temporary vegetative cover (small grains, grasses, legumes or appropriate

mixture are examples) and/or other appropriate means to control erosion. Proper surface water and/or natural watershed erosion techniques should be utilized (terrace grading, diversion ditches, and mulching are examples).

The central deleted area should be distinctly and permanently marked at each end to eliminate any confusion that might precipitate from this area, as to that which was mined prior to May 3, 1978.

Time for Abatement

March 4, 1980 at 9:00 a.m.

On January 8 and 9, 1980, a hearing on this NOV was held before Judge Torbett in Knoxville, Tennessee. At the conclusion of the hearing both parties waived the right to file proposed findings of fact and conclusions of law. Both asked that a final decision be rendered immediately (Tr. I, 283). Accordingly, the Judge rendered a decision in which he sustained the violation as charged in the NOV and held that remedial action was required (Tr. I, 295-300). 1/

On April 14, 1980, OSM Inspector Tony Gaw again inspected the site and issued Cessation Order (CO) No. 80-2-69-5 to appellant. The order charged that appellant had failed to abate the violation in the NOV.

On April 16, 1980, appellant applied for review of and temporary relief from CO No. 80-2-69-5 pursuant to section 525 of the Surface Mining Control and Reclamation Act of 1977 (the Act), 30 U.S.C. § 1275 (1982). A hearing on the application was held before Judge Torbett in Knoxville, Tennessee, on April 21, 1980.

At the outset of the hearing the parties stipulated that there was a highwall on the site, but that an issue existed as to whether the highwall

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1/ Addressing the scope of "remedial action" required of appellant, Judge Torbett stated in part as follows:

"[Y]ou don't cover up something that was exposed to begin with because that would be in violation of the Act. The reason for the Act is to restore the land to essentially what it was before the mining took place.

"You do have to cover, however, sandstone that was covered to begin with that you blew up. In other words, if you blast it off the side of the hill which had ground cover on it, and you've left exposed a sandstone cliff, that's a highwall and that has to be covered up. Now, the fact that it looks just like that which was exposed is a matter to take up with the legislative branch of the government because they have decreed, in my opinion, that it should be covered up."

(Tr. I, 298-299). The text of the Judge's ruling was incorporated in a written decision dated Feb. 8, 1980.

was formed by nature or as a result of mining operations. OSM asserted that no remedial work had been performed since the previous hearing, and that, for this reason, the CO was issued. Counsel for OSM also stated that the "total highwall" must be eliminated (Tr. II, 7). Counsel for appellant stated that the site had been returned to approximate original contour (AOC), except that, as a result of coal extraction, the existing rock face had been cut back to some extent (Tr. II, 10).

It was generally agreed that any testimony would be repetitious of that adduced at the previous hearing, and the transcript of the previous hearing was admitted as evidence in the April 21, 1980, proceeding (Tr. II, 8). OSM did, however, introduce a videotape of an aerial view of the site which, according to the Judge, "showed what appeared to be a long highwall." The tape was made when the area was covered with snow, and Judge Torbett found it impossible to determine whether the apparent highwall was, as appellant contended, a cliff which existed before mining took place. At the April 1980 hearing he concluded "that it was probably an evidentiary impossibility for either party to demonstrate in a courtroom what sandstone outcrop or cliff existed prior to mining and what sections of the highwall were created by mining." He therefore suggested, and the parties agreed, that he would visit the site and inspect the highwall (Decision at 3-4). 2/ To this purpose, he directed the parties to divide the highwall into sections by marking the sections on the ground and transferring those markings to a map. The file contains a contour map scaled 1 inch to 400 feet on which the site has been divided into 18 sections. A ballpoint entry on the margin reads "St. Charles Mining Co. 5/9/80." 3/

Judge Torbett met with the parties and their attorneys at the minesite on May 27, 1980. In his decision he noted that the procedure was unusual because he "would be making a value judgement and putting evidence in the record of my view of the highwall." He stated in his decision that he advised the parties that his views would not be subject to cross-examination and that it would be difficult for any reviewing authority to determine whether he "had made correct judgements in relation to the ultimate disposition of the

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2/ At Tr. II, 34, the Judge stated, however, that the suggestion to visit the site came from OSM.

3/ The map also contains notations in ballpoint pens. According to the Judge, these should be disregarded:

"These writings were placed on the map by the parties when they were attempting to reach agreement in the case. The only marks on the map which should be considered are those straight inked lines which divide the highwall into sections, and the red numbers which number each section.

"It should be noted that as to Sections 6 and 7 the inked in lines which would have divided these two sections have been defaced. Sections 6 and 7 will be treated as separate sections for the purpose of this opinion, however, in that the reclamation work ordered herein will be clearly applicable to identifiable portions of the highwall."
(Decision at 4-5).

case." The decision further states: "The parties again agreed to the procedure being followed. They further agreed that my decision would be on both the issues of temporary and permanent relief. There is no transcript of this conference at Pennington Gap, Virginia" (Decision at 4).

Then, in the presence of the parties and their attorneys, the Judge examined the entire length of the highwall. The results of the Judge's inspection of the site are set forth in his decision as follows:

> Sections 1, 2, 4, 8, 9, 10 and 12, as shown by the attached map are in my opinion, fully reclaimed back to original contour. The original sandstone cliff in its weathered gray condition is generally visible. There is original vegetation naturally growing on top of these sections. At various points on these sections of the cliff there is a change in color from weathered gray to an unweathered sand color which shows that either overburden or sandstone has been removed. It is impossible to determine which was removed, and without knowing that, it is impossible to tell whether or not the cliff is of the same original height before mining. However, a cliff is a cliff, and taken in conjunction with my view of the entire area, these sections of the cliff appear to physically fit in with the lay of the land before it was mined. I am of the opinion that these sections are reclaimed to their approximate original contour.
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> Section 3 must be reclaimed. There is no original sandstone cliff visible at all in this section, and there is a clear cut in the original vegetation showing where overburden was removed, and a highwall of earth was left unreclaimed. This area must be brought back to its approximate original contour by standard reclamation methods.
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> Section 5 must be partially reclaimed to cover that black shale which is presently visible at the bottom of the highwall. I am of the opinion, that the upper part of the highwall, which is a sandstone outcrop, falls into the category of Section 1 ... described above, and that part of the highwall is presently in a state of approximate original contour. However, the area of black shale at the base of this highwall was uncovered by mining. This area should be reclaimed.
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> Section[s] 6 and 7 should be reclaimed in the following manner. The black shale visible in Section 6 should be reclaimed. That part of Section 6 where there is a cut in the original vegetation visible well below the original sandstone cliff should be reclaimed up to the point where this cut appears. On Section 7 there is a sandstone outcrop which existed before mining. This sandstone outcrop does not need to be reclaimed. There is, however, a cut in the original vegetation that is well below this sandstone outcrop. This area should be reclaimed.

Sections 11 and 13 must be reclaimed, and the highwall that exists be eliminated. This highwall consists of earth as opposed to sandstone, and was created by mining.

Sections 14 and 15 must be reclaimed to cover all parts of the existing highwall except that sandstone which is weathered gray by many years of exposure.

Section 16 must be reclaimed to a point where the presently exposed black shale will be covered.

Section 17 must be reclaimed in the following manner. As to part of Section 17, there is no cliff visible at all, and there is a cut in the original vegetation showing where overburden was removed and a highwall of earth was left unreclaimed. This area must be brought back to its approximate original contour. Another part of Section 17 is an original sandstone outcrop which existed before mining. There is, however, a cut in the original vegetation that is below this sandstone outcrop. This area must be reclaimed up to the edge of the cut.

Section 18 must be reclaimed to cover all exposed black shale, and to cover that part of the highwall which is shown by a cut in the original vegetation. The exposed sandstone outcrop need not be reclaimed unless the cut in the original vegetation is above this sandstone. In the later case, the highwall must be reclaimed up to the point where there is a cut in the original vegetation.

I am of the opinion that if the reclamation work set out above is completed by the Applicant, that the post-mining surface configuration of the land in question will closely resemble the surface configuration of the land prior to mining.

I am further of the opinion that the reclaimed land will blend in and complement the surrounding terrain.

It is apparent that to this point the Applicant has never known precisely what part of the area in question needed reclamation work. I am therefore of the opinion that the Applicant's Application for Temporary Relief from Cessation Order No. 80-2-69-5 should be sustained. It is further my opinion that this Cessation Order should be modified to direct the Applicant to reclaim the highwall in question in the manner set out in this opinion. The Applicant shall have 90 days from the receipt of this opinion in which to complete its reclamation. This reclamation which must be completed in 90 days includes only the elimination of that highwall which must be eliminated by virtue of this opinion. The Applicant should, within a reasonable time thereafter, complete whatever reclamation must be done by way of revegetation of those areas disturbed as a result of the highwall elimination.

I am of the opinion that in the interest of justice, that if this reclamation work is completed in its entirety, Cessation Order No. 80-2-69-5 should be automatically vacated. The reason for this is that the original Notice of Violation No. 79-2-69-16 was inadequate to notify the Applicant of its reclamation obligations. The applicant is not completely without fault in this matter, in that, at the hearing on that Notice of Violation, the issue of what precisely needed to be reclaimed was not brought up by the Applicant. It is my recollection that the Applicant's defense at that time was the impossibility of reclamation, which I determined was not a valid defense either legally or factually. The most important thing to be done, however, is proper reclamation of the area in question within the spirit and meaning of the Act.

ORDER

It is therefore ordered that the Applicant's Application for Temporary Relief from Cessation Order No. 80-2-69-5 is sustained from the date of its issuance up to and including a period of 90 days from the date of receipt by the Applicant of this opinion. The Applicant is further granted temporary relief for reasonable time thereafter in which to complete the final reclamation required to revegetate any newly created disturbed area. If at the end of this time, all reclamation work is completed, then Cessation Order No. 80-2-69-5 is ordered vacated.

It is further ordered that if the reclamation work required by this opinion is not completed within the time prescribed, then the Respondent is authorized to issue whatever notices or orders (including a new Cessation Order) it deems necessary in order to insure the final completion of the total reclamation work required by this opinion.

For good cause shown, I will entertain a motion to extend the 90 day period allowed to reclaim the highwall, if that motion is filed within 30 days of the issuance of this opinion. Further, if there is a dispute between the parties as to the interpretation of this opinion as to what areas must be reclaimed, or the extent of reclamation, I will on the petition of either party filed within 30 days of the issuance of this opinion, point out at the minesite the work that must be done. In that event, this opinion will be supplemented to contain the results of any new clarifications or instructions.

(Decision at 5-8).

Appellant's first argument on appeal is that the decision is vague and unreviewable. Appellant asserts that it cannot ascertain the locations within sections where the Judge called for remedial work. Appellant suggests that the Judge should have described the highwall giving dimensions for length

and height, and distances from given section markers. Appellant states that it cannot determine where, within the 800-foot-long section 3, the Judge referred to a "highwall of earth." Appellant makes similar challenges to the Judge's findings on sections 6, 7, 11, 13, 14, 15, and 17. Appellant alleges that in "an earlier tour of the site," Inspector Gaw and St. Charles' engineer Leo Miller had agreed that sections 11, 13, and 15 had been brought back to AOC (Appellant's Brief at 14). 4/

Appellant further argues that in the absence of definitive directions specifying location and extent of required additional backfilling, it cannot reasonably be expected to perform further reclamation work. Appellant cites River Processing, Inc. v. Office of Surface Mining Reclamation and Enforcement, 76 IBLA 129, 90 I.D. 425 (1983), as containing specific, intelligible, and reviewable findings on highwall violations. Appellant also suggests that additional reclamation would destroy reclaimed and revegetated areas because all of the latter must be traversed to gain access to any part of the mined area.

[1] Two sections of the Act are pertinent to a discussion of appellant's arguments. Section 521(a)(5) requires, inter alia, that a notice of violation "shall set forth with reasonable specificity the nature of the violation and the remedial action required." 30 U.S.C. § 1271(a)(5) (1982). Section 525(b) requires the Secretary to make findings and "issue a written decision, incorporating therein an order vacating, affirming, modifying, or terminating the notice or order, or the modification, vacation, or termination of such notice or order complained of and incorporate his findings therein." 30 U.S.C. § 1275(b) (1982).

We cannot agree with appellant that the Judge's findings and his directions on remedial work are either vague or unreviewable. It was for the very purpose of bringing into focus what had theretofore been nebulous that the Judge directed the division of the site into sections, the marking of these sections on the ground, and the preparation of a map depicting the markings. The findings clearly indicate that the whole of section 3 requires reclamation of a highwall of earth. The Judge's specifications of remedial work on the other sections are no less concise, giving the particulars of

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4/ In a footnote to this item, appellant states:

"This tour was conducted on May 9, 1980 following the hearing before Judge Torbett on April 21, 1980. Notations regarding agreement or disagreement of the parties were placed on the mine map later used by Judge Torbett, a point which he referred to in his decision."
(Appellant's Brief at 14).

In further explanation, appellant states in its response brief:

"In accordance with this directive OSM representatives and St. Charles' engineer Leo Miller, marked up the map which Judge Torbett attached to his August 6, 1981 decision. Clearly shown on such map are notations that showed agreement of the parties that various marked sections had been returned to AOC. This map is, of course, part of the record here."
(Appellant's Response Brief at 9).

location, description of highwall, and extent of remedial work required. The pertinent inquiry, whether existing rock exposures closely resemble premining conditions, was properly considered by the Judge. 5/ His findings specially differentiate between natural outcrops and those created in the course of mining operations. Appellant has not been required to backfill or cover rock exposures which existed prior to mining or which closely resemble the premining configuration of the land. See River Processing, supra at 139, 90 I.D. at 430.

There is no doubt that the Judge's description of the violation and the remedial work meet the "reasonable specificity" test of the Act. That test does not require the degree of precision suggested by appellant, and arguments similar to appellant's have been rejected in previous cases. 6/

Appellant also questions the propriety of the Judge's action in inspecting and evaluating the site. Appellant complains it has had no formal hearing to challenge the Judge's personal evaluation of the site and asserts there may well be a due process violation.

We hold that the Judge's action fully comports with the requirements of the Administrative Procedure Act, 5 U.S.C. § 554 (1982). An Administrative Law Judge has an obligation to ensure that a record adequate for decision has been made. That was done here. In addition, appellant was afforded ample opportunities to present all aspects of its case and to seek clarification of doubts it may have had concerning the nature and extent of required reclamation work after the decision was rendered. Appellant, whose engineer

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5/ The Act requires that a mining site be reclaimed to "approximate original contour," which is defined in 30 U.S.C. § 1291(2) (1982), as

"that surface configuration achieved by backfilling and grading of the mined area so that the reclaimed area, including any terracing or access roads, closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain, with all highwalls and spoil piles eliminated; * * *."

6/ See, for example, Sam Blankenship, 5 IBSMA 32, 90 I.D. 174 (1983), where the application for review alleged a lack of reasonable specificity in an NOV. The NOV charged in part:

"Violation 3

The person has failed to transport, backfill, compact, and grade all spoil material to eliminate all highwalls, spoil piles and depressions in order to achieve the approximate original contour [in violation of 30 CFR 715.14].

"Remedial Action Required: Transport, backfill, compact and grade all spoil material to eliminate all highwalls, spoil piles and depressions in order to achieve the approximate original contour in accordance with 30 CFR 715.14."

The NOV speaks simply of "all highwalls," giving neither dimensions nor closer information as to where on the site such highwalls were located. Yet, the Board found no lack of specificity in the NOV. Blankenship, supra at 179-80.

toured the site on the same day as the Judge, 7/ cannot be heard to plead ignorance of what remedial work was required when the Judge issued the requirements.

Under the circumstances of this case we are at a loss to perceive even a colorable due process claim. There were two formal hearings at which appellant participated through counsel. At the second hearing appellant's counsel conceded that any evidence adduced would be repetitive of that presented in the first hearing (Tr. II, 8). A videotape shown at the second hearing was of no use in aiding disposition of the case. It was at this juncture the Judge determined that the parties could probably not produce further probative evidence. When the Judge determined to visit the site, appellant did not object. A "view" by the factfinder of the premises or property involved in the litigation is governed by law in many jurisdictions. See 4 Wigmore, Evidence, § 1163 (notes) (Chadbourn rev. 1972). "Where the object in question cannot be produced in court because it is immovable or inconvenient to remove, the natural proceeding is for the tribunal to go to the object in its place and there observe it." 4 Wigmore, supra at § 1162. Appellant has cited no authorities to the contrary.

[2] Appellant also argues that the reclamation work ordered may be environmentally unsound, detrimental to work already performed, and inconsistent with the purposes of the Act. We have previously addressed these arguments in River Processing, supra, wherein we stated:

> This Board finds to be controlling in this case the construction in Tollage Creek [Elkhorn Mining Co., 2 IBSMA 341, 87 I.D. 570 (1980)] that the requirement for complete highwall elimination is an inflexible element of the reclamation prescribed in 30 CFR 715.14 for the return of land disturbed by surface coal mining to its "approximate original contour." We are persuaded to this viewpoint especially by the fact that none of the several provisions for variances from the "approximate original contour" standard allow retention of highwalls. 30 U.S.C. § 1265(b)(3), (d)(2), and (e) (Supp. V 1981); 30 CFR 715.14(c) through (f) and 716.3; 2 IBSMA at 347-49, 87 I.D. at 574-75 (which includes references to legislative history of the AOC requirement). This circumstance evinces a preemptive legislative finding that the risk of environmental harm from unreclaimed highwalls outweighs the potential for benefits from a less than absolute requirement for highwall elimination. See especially H.R. Rep. No. 493, 95th Cong., 1st Sess. 108-09 (1977). Thus, we conclude that there is no authority either expressed or implied in the Act or regulations for the evaluation of comparative harms undertaken by the Administrative Law Judge in this case.

7/ Appellant's engineer, James Leo Miller, was familiar with the site, describing in some detail the configuration of the terrain and geology, and indicating how these factors influenced coal recovery and subsequent reclamation work (Tr. I, 132, 139).

River Processing, supra at 137-38, 90 I.D. at 429-30. The Board's decision in River Processing, Inc., was affirmed by the Federal district court in Kentucky, River Processing, Inc. v. Clark, Civ. No. 8-316 (D. Ky. May 2, 1985).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

John H. Kelly
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

R. W. Mullen
Administrative Judge